

Self-preservation through Verfassungsdogmatik

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How Not to Become Hegemonial

I have to start with a confession: if it was not for the Bundesverfassungsgericht and German legal scholarship, I would have not become the lawyer I am today. Writing a PhD in the Max-Planck-Institute in Heidelberg, attending classes by giants of German public law taught me to appreciate the famous German “Rechtsdogmatik”, a term that can only be poorly translated by “legal doctrine”. The conceptual sophistication and clarity of thoughts, the persuasive power of reasoning, the attention for details and the elegance with which the lack of answers to certain questions is concealed created for me an aura of infallibility and self-evident truth. I also remember my condescending attitude when I met foreign guests in the Max-Planck Institute who were not familiar enough with this constitutional language, or even dared to challenge some of its conclusions. Being inside this world felt reassuring, safe and also elevating. After wandering through the legal education of post-communist Hungary I finally saw the light.

I have probably been a typical product of a highly effective science diplomacy which attempted to raise the influence of German scholarship by support and openness. And indeed, I am still under the spell of German law and legal scholarship. The aura of infallibility, however, is gone. I came to realise that the “Dogmatik” of public law is neither the expression of ultimate truth about the law, nor it is self-evident. It is an intellectual exercise at the highest level attempted at building a coherent system of norms as insulated as possible from political influence and at the same time executing some sort of agenda, sometimes beyond or against the very language of the law. With this, I do not mean to yield to conspiracy theories of any sorts. On the contrary, I consider the development of doctrines as the achievement of brilliant minds who intend to leave a mark on the world with certain values and objectives in mind.

Sometimes, this value-driven nature of doctrinal work is rather evident, as in the case of the highly influential interpretation of human dignity by Günter Dürig in his seminal article¹⁾Günter Dürig, Der Grundrechtssatz von der Menschenwürde: Entwurf eines praktikablen Wertsystems der Grundrechte aus Art. 1 Abs. I in Verbindung mit Art. 19 Abs. II des Grundgesetzes, Archiv des öffentlichen Rechts, Vol. 81 (N.F. 42), No. 2 (1956), pp. 117-157. and the first edition of the leading commentary of the Grundgesetz²⁾Günter Dürig, in Theodor Maunz/Ders.: Grundgesetz, 1958, Art. 1 Abs. 1.. In this case, the program behind linking the language of the Grundgesetz with the moral philosophy of Immanuel Kant and stipulating a link between human dignity and all fundamental rights of the Grundgesetz was meant to add additional moral weight to these guarantees und thus elevate and stabilise them hardly a decade after the end of Nazi rule. Also, elevating the principle of proportionality to the level of constitutional law without

explicit textual basis in the Grundgesetz³⁾ Bernd Grzeszick in: Maunz/Dürig, Grundgesetz-Kommentar, 90. EL Februar 2020, Rn. 108. by the Bundesverfassungsgericht was clearly motivated by the desire to effectively control the actions of the state without depriving other branches of government of their regulatory or administrative power. Thus, the principle of proportionality was an effective means in the quest for judicialising public authority. Its Europe-wide success – with the help of the European Commission and Court of Human Rights – can be best explained by this effectiveness.

Already these examples indicate that the problem with Rechtsdogmatik is not that it is based on a broader policy objective or that it does not (always) make this objective transparent. Rather, it is the specific agenda that matters. I cannot make generalised comments, but one issue is especially relevant in the context of the present debate on German legal hegemony. This issue is the various constitutional reservations towards the supremacy of European Union law. I suggest that these reservations all went beyond the actual normative foundations, yet they followed different agendas, a fact that has serious implications for the position of German law today.

The human rights reservation in Solange I was based on the proposition that the language of Article 24 Grundgesetz “*cannot be taken literally*”, and so the term “transfer of sovereign rights” shall be construed as opening the legal system with such limitations that are necessary to protect the basic structure of the Grundgesetz. What is more, the basic structure of the Grundgesetz is not defined here on the basis of the eternity clause in Article 79 III. The reason for this is clear: the eternity clause only exempts human dignity from constitutional amendments, but not fundamental rights in general. Hence a general human rights reservation towards the supremacy of EU law could not be based on this provision, since the Bundesverfassungsgericht has resisted the idea to derive all fundamental rights from human dignity.

The *ultra vires* reservation of the Maastricht judgment has been widely discussed and criticised, and there is no need to address all the issues here. Besides the fact that the *ultra vires* reservation is a giant *obiter dictum* in the judgment, I would merely like to point to the utter lack of discussing what is today Article 344 TFEU and was Article 219 TEC at the time of the Maastricht judgment. This provision, which has been part of the founding treaties even since 1957, clearly creates in combination with Article 263 TFEU the monopoly for the ECJ to establish whether a European institution overstepped its powers. Not addressing this provision by the Bundesverfassungsgericht while claiming to act as the ultimate arbiter of *ultra vires* acts does not seem to be coherent, since the whole argument is based on what competences have been transferred to the EU by the founding treaties.

Constitutional identity was not born as a proper constitutional reservation towards the supremacy of EU law since, at its conception in the Lisbon judgment, it was meant to limit the transfer of sovereign competences to the EU by treaty amendment, a limit that is not *per se* incompatible with EU law. It is also convincing to argue that Article 79 III Grundgesetz does not only prohibit express constitutional amendments, but also the conclusion of international treaties that are in violation of the eternity clause. It is, however, less convincing to claim that certain competences must remain with the German

state because democracy is not properly ensured within the European Union. And there is simply no logical deduction that could explain the very specific list of non-transferable competences derived from the principle of democracy.

The departure from the textual basis in all three instances clearly demonstrates that the Bundesverfassungsgericht was out on a mission in each case. Yet the agenda was completely different on different occasions.

In Solange I, the program was to ensure an effective protection for human rights without loopholes. This agenda – despite the open challenge to the supremacy of EU law – actually promoted European integration as it led to an effective fundamental rights protection within the EU, at least against EU institutions. What is more, the agenda behind the human rights reservation yielded the expansion of ideals of German law to European level, since the case law of the ECJ on general principles of law and the Charter of Fundamental Rights bear strong resemblance with German Grundrechtsdogmatik. In the terms of von Bogdandy in this debate, the human rights reservation actually Germanised Europe.

The ultra vires reservation and constitutional identity serve a distinctly different purpose: the preservation of the competences and the room of manoeuvre of German decision-makers, including the Bundesverfassungsgericht itself. This holds true even for the recent PSPP Judgment, as it ultimately attempts to protect the German taxpayers' money from being used to finance underperforming economies in Europe. I do not consider this agenda as an attempt at German legal hegemony. It is rather focused on the preservation of the German statehood with its indeed smoothly running state machinery and economy. This is not expansion, this is defensive inward looking. Instead of Germanising Europe – which would be in many ways a positive attempt – this agenda tries to preserve the Germanness of Germany and to save Germany from Europe. However influential the idea of constitutional identity has become all over Europe, however happily Eastern European constitutional courts will identify *ultra vires* acts of the EU, these will not transform Europe or the legal system of the EU into something more German. What we get instead is more fragmentation and further challenges to European integration based on the misinterpretation of the dicta of the Bundesverfassungsgericht. This purported self-preserving agenda will not increase but diminish the influence of German legal thoughts.

References

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- ↑1 Günter Dürig, Der Grundrechtssatz von der Menschenwürde: Entwurf eines praktikablen Wertsystems der Grundrechte aus Art. 1 Abs. I in Verbindung mit Art. 19 Abs. II des Grundgesetzes, Archiv des öffentlichen Rechts, Vol. 81 (N.F. 42), No. 2 (1956), pp. 117-157.
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- ↑2 Günter Dürig, in Theodor Maunz/Ders.: Grundgesetz, 1958, Art. 1 Abs. 1.
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- ↑3 Bernd Grzeszick in: Maunz/Dürig, Grundgesetz-Kommentar, 90. EL Februar 2020, Rn. 108.
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